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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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AMNESTY INTERNATIONAL USA,  
et al.,

Plaintiffs,

v.

07 Civ. 5435

CENTRAL INTELLIGENCE AGENCY,  
et al.,

Defendants.

-----x

August 29, 2008  
9:15 a.m.

Before:

HON. LORETTA A. PRESKA

District Judge

APPEARANCES

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6           As we know we're here today on the motion of the  
7   United States for a partial stay of proceedings in this case.  
8   Specifically, the government seeks a four-month stay of  
9   proceedings with respect to two out of 17 categories of  
10   documents included in the plaintiffs' supplemental CIA request,  
11   one of several requests at issue in this complex litigation.

12           As counsel have made reference to today, on December  
13   6, 2007 CIA director Michael V. Hayden announced that during  
14   the initial stage of the CIA's terrorist detention and  
15   interrogation program the CIA videotaped certain interrogations  
16   and then in 2005 destroyed those tapes. Shortly after this  
17   public announcement, Attorney General Michael B. Mukasey  
18   directed a preliminary inquiry and thereafter on January 2,  
19   2008 directed a full criminal investigation into the  
20   destruction of the tapes. On that same date the Attorney  
21   General appointed John H. Durham to serve as acting United  
22   States attorney for the Eastern District of Virginia for the  
23   purpose of supervising that investigation.

24           As set out in the Durham declaration, the criminal  
25   investigation is currently ongoing, and the Durham team

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1 estimates that the investigation will take at least four more  
2 months.

3 With respect to the supplementary CIA request, as  
4 counsel have discussed here today the CIA began its  
5 investigation of that supplementary request shortly after  
6 receiving it on or about December 28, 2007, to determine  
7 whether it could conduct a search for any of the requested  
8 categories of documents.

9 As counsel has also discussed today, the agency  
10 determines that a Glomar response would be submitted as to  
11 certain of these categories, but work on the remaining three is  
12 either completed, or in process, or at issue here.

13 As further set forth in the Durham declaration, the  
14 Durham team has determined that the CIA's continued search for,  
15 review, and processing of documents potentially responsive to  
16 two categories in the CIA supplementary demand, would interfere  
17 with the criminal investigators' ability to conduct a complete,  
18 thorough and untainted federal criminal investigation. Such  
19 taint in turn, according to Mr. Durham, could jeopardize the  
20 successful prosecution of any criminal case brought against any  
21 individuals who were found to have violated federal law in  
22 connection with the destruction of the CIA videotapes.

23 Specifically, as set forth in Mr. Durham's  
24 declaration, he has determined that proceeding with respect to  
25 these two categories of records would interfere with the

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1 integrity of the Durham team's criminal investigation due to  
2 the overlap between the information contained in the  
3 potentially responsive records and the central questions raised  
4 by the criminal investigation.

5 Here, the requests at issue are numbers 11 and 13 in  
6 the supplementary CIA request. Number 11 requests "the cables  
7 between Deputy Director of Operations at the CIA (or other  
8 agency official(s) and the operative(s) in the field discussing  
9 and/or approving the use of waterboarding on Abu Zubaydah. The  
10 existence of such cables was acknowledged by former CIA  
11 employee John Kiriakou during an NBC news program on  
12 December...."

13 Number 13 requests "videotapes, audiotapes and  
14 transcripts of materials related to interrogations of detainees  
15 that were acknowledged to exist during the case of United  
16 States v. Zacharias Moussaoui and described in a letter from  
17 the United States Attorney Chuck Rosenberg to Chief Judge Karen  
18 Williams, United States Court of Appeals for the Fourth  
19 circuit, and Judge Leonie Brinkema, United States District  
20 Court, Eastern District of Virginia, dated October 25, 2007,  
21 including, but not limited to two videotapes and one audiotape  
22 of interrogations of detainees, the transcripts of those tapes  
23 submitted for the court's review in the Moussaoui case, and the  
24 intelligence cables summarizing the substance of those tapes  
25 ...."

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1           The parties agree that this court has the authority to  
2     issue a stay of proceedings. As the Supreme Court has held,  
3     "the power to stay proceedings is incidental to the power  
4     inherent in every court to control the disposition of the  
5     causes on its docket with economy of time and effort for  
6     itself, for counsel, and for litigants." *Landis v. North*  
7     *American Co.*, 299 U.S. 248, 254 (1936). This discretionary  
8     authority has been held to be properly exercised when a civil  
9     action threatens to interfere with a related criminal  
10    proceeding, See, e.g., *United States v. Kordel*, 397 U.S. 1, 12  
11    n. 27 (1970); *Kashi v. Gratsos*, 790 F.2d 1050, 1057 (2d Cir.  
12    1986).

13           Indeed, courts have stayed civil proceedings related  
14    to ongoing criminal investigations prior to the issuance of  
15    indictments. See, e.g., *SEC v. Downe*, 92 Civ. 4092 (PKL), 1993  
16    WL 22126, at \*14 (S.D.N.Y. January 26, 1993), *Board of*  
17    *Governors of Federal Reserve System v. Pharaon*, 140 F.R.D. 634,  
18    641 (S.D.N.Y. 1991), *SEC v. Control Metals Corp.*, 57 F.R.D. 56,  
19    58 (S.D.N.Y. 1972).

20           The Fifth Circuit has commented that this need to stay  
21    related civil proceedings in the face of an ongoing criminal  
22    investigation arises from the fundamental differences between  
23    civil and criminal proceedings, and that court commented on the  
24    compelling public interest in facilitating the enforcement of  
25    the criminal laws. It stated:

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1 "The very fact that there is a clear distinction  
2 between civil and criminal actions requires a government policy  
3 determination of priority: Which case should be tried first.  
4 Administrative policy gives priority to the public interest in  
5 law enforcement. This seems so necessary and wise that a trial  
6 judge should give substantial weight to it in balancing the  
7 policy against the right of a civil litigant to a reasonably  
8 prompt determination of his civil claims or liabilities."

9 Campbell v. Eastland, 307 F.2d 478, 487 (5th Cir.  
10 1962); see also In re Ivan F. Boesky Securities Litigation, 128  
11 F.R.D. 47, 49 (S.D.N.Y. 1989).

12 As our respected colleague on this court, the late  
13 Milton Pollack observed, "Neither criminal nor civil procedure,  
14 in the Federal Rules, has a provision that explicitly addresses  
15 the problem of parallel proceedings .... In all cases, the  
16 court must carefully balance the interests of the private  
17 litigants against those of the public." Milton Pollack,  
18 Parallel Civil and Criminal Proceedings, 129 F.R.D. 201, 212  
19 (S.D.N.Y. 1989).

20 The parties here agree that this is not the ordinary  
21 case. Plaintiffs note that they are not ordinary private  
22 litigants. They seek disclosure for the purpose of  
23 dissemination to the public to further public understanding of  
24 government conduct and particularly to contribute to the  
25 current debate around the rendition and secret detention

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1 policies and programs put in place by the CIA. Thus, these  
2 plaintiffs stand in the shoes of the public they seek to  
3 inform.

4 As plaintiffs point out, this public interest is  
5 embodied in the Freedom of Information Act. In enacting FOIA,  
6 Congress "intended to permit citizens access to information in  
7 the possession of the federal government that is unnecessarily  
8 sheltered from public view." Halpern v. Department of Defense,  
9 181 F.3d 279, 284-85 (2d Cir. 1999).

10 FOIA's statutory scheme recognizes that the public's  
11 need for information is often times sensitive. See 5 U.S.C.  
12 Section 552 (a)(6)(E)(iii). See also Epic v. Department of  
13 Justice, 416 F. Supp. 2d 30, 40 (DDC 2006), ACLU v. Department  
14 of Defense, 339 F. Supp. 2d 501, 504 (S.D.N.Y. 2004).

15 For this reason Congress has "evinced an increasing  
16 concern over the timeliness of disclosure, recognizing that  
17 delay in complying with FOIA requests may be 'tantamount to  
18 denial'". ACLU, 339 F. Supp. 2d at 504 (quoting H. Rep. No.  
19 93-876 at 6 (1974)).

20 On the other side, this is also not the normal  
21 situation where the producing agency requests relief from its  
22 obligations under the Freedom of Information Act. Rather, this  
23 is the rare situation where one arm of the government is  
24 investigating another arm of the government, and the  
25 investigating arm -- here the Department of Justice -- through

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1 acting United States Attorney Durham, has determined that the  
2 search for review and processing of documents responsive to  
3 these two requests will taint its criminal investigation of the  
4 producing agency, here the CIA.

5 More specifically, as set forth in the Durham  
6 declaration, the criminal investigation is broad, essentially  
7 looking into all aspects of the destruction of the videotaped  
8 interrogations, including whether anyone obstructed justice,  
9 made false statements or acted in contempt of court or Congress  
10 in connection with the destruction of the videotapes.

11 The investigation also includes determining whether  
12 any materially false or misleading statements were made in  
13 connection with the Moussaoui trial and, if so, what the  
14 speaker's knowledge, motive and/or intent was in making those  
15 false statements. These inquiries involve questions regarding  
16 what if any knowledge, motive or intent there was to destroy  
17 videotapes made by the CIA and/or to make materially false and  
18 misleading statements in connection with the Moussaoui trial.

19 As further set out in the Durham declaration, after  
20 reviewing the supplemental CIA request, the Durham team  
21 determined that as written several categories of the requested  
22 documents were closely intertwined with the inquiries of the  
23 federal criminal investigation.

24 As noted, the CIA currently intends to search for,  
25 review and process documents responsive to categories 11 and

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1 13. Because many of the individuals who would be involved in  
2 the search for, review and processing of potentially responsive  
3 documents are witnesses, or potential witnesses in the criminal  
4 investigation, such searching, review and processing could  
5 influence the recollections of these individuals and cause  
6 them, intentionally or unintentionally, to change their  
7 testimony, to conform their version of events to those in the  
8 records.

9 Similarly, if there was any public release of  
10 nonexempt responsive records or information contained in those  
11 records, such a release could also affect the recollections and  
12 testimony of witnesses and potential witnesses in that  
13 investigation.

14 Indeed, as mentioned during oral argument, because of  
15 these concerns about influencing recollection and testimony,  
16 the Durham team has already asked appropriate authorities  
17 within the CIA not to show records and documents or otherwise  
18 make certain records and documents available to individuals who  
19 will be interviewed as witnesses in connection with the  
20 criminal investigation. In the absence of a stay, these  
21 witnesses and potential witnesses would be required to review  
22 documents that the Durham team has already taken affirmative  
23 steps to prevent them from seeing.

24 To the extent that plaintiffs argue that it is  
25 possible for a person outside of the zone of potential

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1 witnesses in the Durham investigation to undertake the review  
2 and processing of documents responsive to categories 11 and 13,  
3 that argument ignores the reality of the search process and the  
4 need for a producing agency to proffer a good faith basis for  
5 the invocation of any exemption.

6 The FOIA processing mechanism requires consultation  
7 with individuals who have substantive knowledge of the  
8 documents at issue before any exemption may be claimed,  
9 otherwise the processor is merely guessing.

10 Similarly, to the extent that there might be  
11 responsive documents to categories 11 or 13 that are not  
12 involved in the Durham investigation, that speculative fact  
13 does not undercut the danger posited by the review process.  
14 Again, individuals with substantive knowledge would have to  
15 review all of the documents that are responsive in order to  
16 determine responsiveness and the basis or lack of basis for any  
17 exemption claimed. Separating out the documents that are  
18 subject to the investigation or not would require the review  
19 that might result in a taint of recollection or testimony.

20 Thus, the substantive overlap between the  
21 supplementary CIA request embodied in categories 11 and 13, and  
22 the ongoing criminal investigation, and the corresponding risk  
23 of interference with that criminal investigation, strongly  
24 supports a partial stay of this FOIA case.

25 To the extent that plaintiffs characterize

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1 Mr. Durham's objection as merely a staffing issue that can be  
2 circumvented by selecting an individual who is not a potential  
3 witness, to search for, review and process potentially  
4 responsive documents, that argument also ignores the realities  
5 and the uncertainties of an ongoing criminal investigation and  
6 the obviously classified nature of the documents at issue.

7       Until the investigation has concluded, neither the  
8 Durham team nor the CIA will know which employees will  
9 ultimately fall outside the scope of the investigation.

10       Indeed, even if the Durham team had already identified  
11 all those employees outside the scope of the investigation,  
12 revealing those potentially sensitive details regarding the  
13 conduct of the investigation prematurely could well taint the  
14 gathering and processing of the documents by providing further  
15 details concerning how the criminal investigation is being  
16 conducted. Thus, these concerns for the integrity of the  
17 criminal investigation, not administrative staffing concerns,  
18 weigh heavily on the public interest.

19       In balancing these competing interests then, as  
20 proscribed by Judge Pollack, and the cases cited by the  
21 parties, the balance here tips decidedly in favor of the  
22 request of the United States.

23       First, the general priority given to the public  
24 interest in law enforcement operates here to favor the  
25 government over the nonlaw enforcement public interest in

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1 timely disclosure embodied by the FOIA. This is particularly  
2 true here where the prejudice from a tainted criminal  
3 investigation is permanent.

4 I take plaintiff's view that timeliness is next to  
5 godliness, and any delay of disclosure of the information is a  
6 delay that can never be recalled or remedied. The permanent  
7 prejudice to a criminal investigation is actually the end of  
8 the story.

9 Secondly, the unique nature of the Department of  
10 Justice's investigation, and the exceedingly important issues  
11 at hand, also counsel in favor of a stay.

12 As the Supreme Court noted in Landis, "Especially in  
13 cases of extraordinary public moment, the individual may be  
14 required to submit to delay not immoderate in extent and not  
15 oppressive in its consequences if the public welfare or  
16 convenience will thereby be promoted." 299 U.S. at 256.

17 This case is undoubtedly one of extraordinary public  
18 moment. As counsel have noted, significant congressional  
19 investigations are underway and several federal judges have  
20 raised legitimate concerns about the actions the Durham team is  
21 investigating.

22 Thus, I find that the government interest in the  
23 integrity of its ongoing criminal investigation on a matter of  
24 intense public congressional and judicial interest, outweighs  
25 the plaintiffs' interest in a prompt response to its FOIA

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1 request. Accordingly, the request of the United States for a  
2 four-month stay with respect to categories 11 and 13 of the  
3 CIA's supplemental request is granted.